Supreme Court, U.S.
FILED
JAN 23 2003

(3)

No. 02-692

IN THE

Supreme Court of the United States

ARCHER-DANIELS-MIDLAND COMPANY,
Petitioner,

v.

DELLWOOD FARMS, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY TO BRIEF IN OPPOSITION

Respondents' argument concerning ADM's first question presented depends upon a false premise—namely, that the Court of Appeals here applied the same standard of admissibility as other circuits that have addressed nonparty invocations. And respondents make no argument at all with respect to ADM's second question presented.

1. The Brief in Opposition Misstates the Case Law.

Citing decisions of the Second, Third, Fifth, and Eighth Circuits, respondents assert that "*[i]n each of these cases, as here, the courts applied the same standard*, looking at the facts and circumstances to determine 'whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth.'" Br. Opp. 26 (quoting *LiButti v. United States*, 107 F.3d 110, 124 (2d Cir. 1997) (emphasis added)). Later, respondents go even farther, positing the existence of a "*uniform rule adopted by six circuit courts of appeals, including the court below.*" Br. Opp. 28 n.20 (emphasis added).

Respondents' claim of uniformity is specious.

First, contrary to respondents' suggestion, Br. Opp. 26, the Court of Appeals here did *not* apply a trustworthiness standard. *The District Court* applied such a standard—and ruled the invocations inadmissible. A. 46a. In contrast, the Court of Appeals relied upon what it called the "general rule" that "an adverse inference may be drawn from such a refusal in a civil case." A. 21a. The only limitation upon that rule was a trial court's "general power under Fed. R. Evid. 403 to exclude relevant evidence if its probative value is clearly outweighed by (so far as relevant here) its capacity to confuse the jury." A. 21a.

Second, despite what respondents say, it is just not true that the Second, Third, Fifth, and Eighth Circuits have all "applied the same standard," one that asks whether an adverse

inference would be trustworthy. Br. Opp. 26. The Second Circuit applies a trustworthiness standard, *see LiButti*, 107 F.3d at 124, but the Fifth and Eighth Circuits follow a "case-by-case" approach. *FDIC v. Fid. & Deposit Co. of Md.*, 45 F.3d 969, 978 (5th Cir. 1995); *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1481 (8th Cir. 1987). The Third Circuit appears to follow such an approach as well. *See RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 277 (3d Cir. 1986).

Third, respondents misrepresent the holding in *Veranda Beach Club Ltd. Partnership v. Western Surety Co.*, 936 F.2d 1364 (1st Cir. 1991). According to respondents,

> The First Circuit *held* that the district court had not abused its discretion in refusing to allow the introduction of the requests and responses, "because they were cumulative; the information sought through the requests had already been conclusively established in other ways." *Id.* at 1374.

Br. Opp. 27. In fact, however, the First Circuit did not hold that the information had properly been deemed cumulative. The language respondents quote appears, not in the First Circuit's statement of its holding, but in its description of the district court's ruling. *Veranda*, 936 F.2d at 1374. This is apparent when one examines the full sentence whose beginning respondents have lopped off:

> The court ruled that the requests and responses could not be read because they were cumulative; the information sought through the requests had already been conclusively established in other ways.

Id.[1]

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[1] Respondents also incorrectly describe the witness at issue in *Veranda* as a mere "employee" of the defendant corporation. Br. Opp. 27, 28. He was in fact "an officer and part-owner" of the corporation. *Veranda*, 936 F.2d at 1373.

In short, respondents are mistaken in suggesting that the Court of Appeals here simply issued one more in a consistent line of decisions concerning nonparty invocations.

2. Justice Scalia's Dissent in *Mitchell v. United States* Does Not Address Nonparty Invocations.

Respondents resort to further obfuscation when they cite Justice Scalia's dissent in *Mitchell v. United States*, 526 U.S. 314 (1999), as having rejected the view of nonparty invocations urged by Judge Winter and Judge Stern.[2] Br. Opp. 26 n.19. In *Mitchell*, the majority and the dissenters disagreed over whether *the Constitution* prohibited consideration of *a criminal defendant's* silence at sentencing. *Compare* 526 U.S. at 330 ("the District Court imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination"), *with id.* at 335 (Scalia, J., dissenting) ("the text and history of the Fifth Amendment give no indication that there is a federal *constitutional* prohibition on the use of the defendant's silence as demeanor evidence" (emphasis in original)). What ADM's first question presented concerns, and what Judge Winter and Judge Stern addressed, is whether, the Constitution aside, *the law of evidence* should recognize *nonparty* invocations of the Fifth Amendment as competent proof. Nowhere in his dissent in *Mitchell* did Justice Scalia take a position as to the proper evidentiary treatment of nonparty invocations.[3]

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[2] *See Brink's Inc. v. City of N.Y.*, 717 F.2d 700, 715 (2d Cir. 1983) (Winter, J., dissenting); *Lionti v. Lloyd's Ins. Co.*, 709 F.2d 237, 245 (3d Cir. 1983) (Stern, D.J., dissenting).

[3] Similarly, none of the cases cited at Br. Opp. 24 concerned invocations of the Fifth Amendment by a nonparty.

3. Respondents Do Not Address the Court of Appeals' Substitution of an Answer-Based Standard for a Question-Based Standard.

It is striking that respondents have nothing to say in defense of the Court of Appeals' holding (which is the subject of ADM's second question presented) that "[t]o be privileged by the Fifth Amendment to refuse to answer a question, *the answer* one would give if one did answer it" must have a tendency to incriminate the witness. A. 22a (emphasis added). They have nothing to say because there is nothing that can be said. The holding is at odds with numerous decisions of this Court (including *Ohio v. Reiner*, 532 U.S. 17, 20-21 (2001) (per curiam)) and numerous decisions of other courts of appeals.

There is only one place in the Brief in Opposition where respondents even touch on the Court of Appeals' rewriting of the standard for invoking the Fifth Amendment privilege. In a footnote, respondents say the Court of Appeals' decision is consistent with *Ohio v. Reiner*, 532 U.S. 17, because

> what the court below was saying was that "a responsive answer to the question[s] or an explanation of why [they could not] be answered [could have been] dangerous," 532 U.S. at 21 (internal quotation and citation omitted), only if ADM had conspired to fix HFCS prices."

Br. Opp. 24 n.17. Respondents' claim of consistency is entirely dependent upon a truncated—and therefore distorted—version of the standard stated in *Reiner*.

Reiner actually states that "'*[i]t need only be evident from the implications of the question, in the setting in which it is asked*, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'" *Reiner*, 532 U.S. at 20-21 (quoting *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951) (emphasis added)). When one examines this

sentence from the *Reiner* opinion in its entirety, rather than looking only at the fragment quoted by respondents, it is apparent that the Court of Appeals' decision, far from being "consistent" with the *Reiner* standard as claimed by respondents, Br. Opp. 24 n.17, directly conflicts with that standard.

In recognition of the Fifth Amendment's "basic function[]" of "protect[ing] *innocent* men . . . who otherwise might be ensnared by ambigious circumstances," *Reiner*, 532 U.S. at 21 (emphasis and omissions in original) (internal quotations omitted), *Reiner* focuses the inquiry on the question and the setting. In contrast, the Court of Appeals holds that the availability of the privilege depends on what the witness's answer would be. That holding necessarily assumes that the privilege may be invoked only by those who in fact have something to hide—an assumption that is fundamentally incompatible with *Reiner* and the other decisions of this Court cited in *Reiner*, 532 U.S. at 21.

4. An Important Issue Fundamental to the Further Conduct of the Case Is Appropriately Reviewed Prior to Final Judgment.

Respondents' final argument is that, because the ruling on the Fifth Amendment invocations was not critical to the Court of Appeals' reversal of the grant of summary judgment, the ruling may not be significant, and any review by this Court should await final judgment. Br. Opp. 29. To the contrary, the significance of the ruling to the further conduct of this litigation—in which respondents are seeking $4 billion in damages—is manifest. "The potential prejudice in revealing the invocation of the Fifth Amendment is high . . . ." *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1465 (5th Cir. 1992). Respondents elicited more than 200 pages of Fifth Amendment invocations at one of the relevant depositions and more than 300 pages of such invocations at the other deposition. PX 26, 138-39. Respondents no doubt will seek

to put all those invocations before the jury at trial. Whether the invocations are competent evidence is hardly a "[t]angential" issue. Br. Opp. 22.

Nor is the interlocutory character of the case a reason to deny review. In appropriate cases presenting important issues, this Court reviews interlocutory rulings "fundamental to the further conduct of the case." *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (internal quotation omitted); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *see, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-54 (1964).

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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